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in the Supreme Court of the United States

OCTOBER TERM, 1976

[redacted] NO. 76-1090

MARIANNE COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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The Petitioner, MARIANNE COOK, by undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit and original opinion and opinion on rehearing entered on August 6, 1976 and January 7, 1977 respectively.

OPINION BELOW

The original opinion and the opinion on rehearing of the Court of Appeals are not yet reported. Copies of the original opinion, the opinion on rehearing and judgment are included in the Appendix to this Petition.

JURISDICTION

The original opinion and Judgment of the Court of Appeals was originally entered on August 6, 1976. The Court's order on rehearing was entered on January 7, 1977. On January 19, 1977 the Fifth Circuit entered an Order staying its mandate as to the Petitioner, COOK, to and including February 6, 1977. This Petition was timely filed. The jurisdiction of this Court is based upon Title 28, United States Code Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

DOES THE FOURTH AMENDMENT PROHIBIT A POLICE OFFICER FROM ENTERING THE RESIDENCE OF AN INNOCENT THIRD PARTY TO EXECUTE AN ARREST WARRANT FOR A SUBJECT THE OFFICER REASONABLY BELIEVES IS WITHIN UNLESS EITHER (1) ENTRY IS MADE PURSUANT TO A SEARCH WARRANT OR (2) EXIGENT CIRCUMSTANCES MAKE THE DELAY INCIDENT TO OBTAINING A SEARCH WARRANT UNREASONABLE

II

ASSUMING, ARGUENDO, THAT A LAWFUL ARREST WAS MADE IN THE LIVING ROOM AREA OF PETITIONER'S RESIDENCE, WAS THE SUBSEQUENT SEARCH OF THE MASTER BATHROOM AREA BEYOND THE SCOPE PERMITTED BY THE FOURTH AMENDMENT WHEN THE RECORD ESTABLISHES THAT THE ONLY STATED PURPOSE FOR SAID SEARCH WAS TO LOCATE A SUSPECT FOR WHOM AN ARREST WARRANT WAS THEN OUTSTANDING WHERE THE OFFICERS LACKED PROBABLE CAUSE OR REASON TO BELIEVE THAT THE SUSPECT WAS WITHIN THE PREMISES SEARCHED.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In late March, 1974, the Drug Enforcement Administration (hereinafter referred to as the DEA) commenced an extensive investigation into the narcotic activites of one Richard Cravero and his associates. The DEA utilized a boat captain by the name of William Orr as an informant in this investigation. During the latter part of June, 1974, the DEA received information from Orr that Cravero and his associates had successfully imported a substantial quantity of cocaine into the South Florida area by boat. After receiving this information from Orr, the DEA decided to utilize Orr's relationship with Cravero in an attempt to learn where Cravero and his associates had stashed the cocaine.

Pursuant to this plan, at approximately 7:00 p.m. on July 14, 1974, agents of the DEA, assisted by local police officers, surveilled a meeting of Cravero, Ronald Chandler and Sharon Willets, (co-defendants of the Petitioner's) and Orr at a restaurant in Broward County, Florida.

After this meeting the police followed Cravero, Chandler and Willets, who had departed by automobile. At approximately 9:00 p.m. this vehicle, followed by the police, arrived at the residence of the Petitioner. Four persons were observed by the police to exit this vehicle and enter Petitioner's residence. Cravero, Chandler and Willets were positively identified by the police as being in this vehicle just prior to the time it arrived at Petitioner's residence. The fourth person could not be identified *at that time*. Up until the time this vehicle arrived at Petitioner's residence the DEA had no evidence linking the Petitioner Cook to Cravero or any of his associates,

despite almost daily surveillance of all known associates of Cravero from the commencement of the investigation. Although the police were then in possession of arrest warrants for Cravero and Chandler,[1] no attempt was made to execute any of the warrants from the time they were issued and significantly between the time the meeting was surveilled and the time this vehicle arrived at Petitioner's residence despite numerous safe opportunities to do so. Execution of the arrest warrants was delayed allegedly because an arrest would have disclosed the identity of the informant Orr, and would have thwarted any chance the officers had to utilize Orr to locate the cocaine.

Almost immediately after the vehicle arrived at the Petitioner's residence her home was completely surrounded by approximately fifteen police officers. No attempt was made by the officers to enter the Petitioner's residence upon their arrival. At 11:20 p.m. that same evening, Cravero spoke by telephone from the Petitioner's residence to the informant Orr. Orr relayed his conversations with Cravero to the officers on surveillance. As a result thereof, the officers then became convinced that Cravero was already aware of Orr's role as an informant. Because Orr could no longer be utilized as a source of information that could lead to the location of the cocaine, a decision was made to execute the arrest warrants that evening. Entry of the Petitioner's residence for the stated purpose of executing the arrest warrants was delayed, however, for approximately two more hours after the 11:20 p.m.

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[1]The arrest warrant for Cravero was a state warrant issued on July 10, 1974 charging him with possession of marijuana which had been seized from a burning vessel on July 2, 1974. The arrest warrant for Chandler stemmed from a totally unrelated federal narcotics indictment.

phone conversation between Cravero and Orr. Despite the fact that Petitioner's residence was completely surrounded,[2] at no time did the police even consider obtaining a *search* warrant authorizing their entry for the purpose of searching for Cravero and Chandler. Neither was any attempt made to order Cravero and Chandler to come outside so that the arrests could be effected without a *search* warrantless entry of Petitioner's residence. Instead, at approximately 1:20 a.m. during the early morning hours of July 15, 1974, when it became obvious that Cravero and Chandler were going to stay at the Petitioner's premises indefinitely, the police decided to enter Petitioner's residence. When Petitioner opened the front door, the officers announced they had arrest warrants; immediately were able to observe Cravero in the living room area and Chandler near a doorway that leads to the master bedroom; and without Petitioner's consent, nor any request for it, rushed into the house to arrest them. After Cravero and Chandler were handcuffed, the officers proceeded towards the master bedroom. As they approached the bedroom door, Petitioner inquired whether the officers had a search warrant to search her house. DEA agent Fitzgerald advised the Petitioner that they were looking for another suspect they had an arrest warrant for named Donald Troise.[3] When Petitioner refused to give her con-

[2]The Fifth Circuit Court of Appeals concluded that there were no exigent circumstances present in this case that could make the delay incident to obtaining a search warrant unreasonable. See, *U.S. v. Cravero*, footnote 24, Appendix pg. 13.

[3]Troise had been observed in the company of Cravero earlier that same evening in the vehicle that Cravero, Chandler and Willets entered after the meeting with Orr at the restaurant in Broward County. The search for Troise was the *only* reason proffered by the government at the Motion to Suppress hearing and the trial for the officers' search of the master bathroom after the arrests of Cravero and Chandler in

sent to allow the officers to enter her master bedroom she was arrested for, "obstruction of justice".

The officers then entered the master bedroom. Once inside the master bedroom they heard rustling sounds emanating from inside a closed doorway which leads to the master bathroom. No attempt was made to order any person who may have been inside the master bathroom to come out therefrom. Instead, the officers rushed into the bathroom and there observed Sharon Willets leaning down next to the shower stall. When the officers approached Sharon Willets they observed approximately a kilo of cocaine in a metal tray inside the shower stall. This cocaine and other paraphernalia was then seized from the master bathroom area. A search of the entire residence disclosed that Donald Troise was not in the Petitioner's home.

The Petitioner was subsequently arrested and charged with conspiracy to import and possess the cocaine seized from the master bathroom with the intention to distribute same, and with actual possession of the cocaine with the intent to distribute same.

The District Court concluded, after a Motion to Suppress hearing, that the officers were not required to obtain a search warrant before they entered Petitioner's residence and, that the subsequent search of the master bedroom and bathroom was reasonable.

the living room area. The Petitioner contends that at the moment the officers entered the master *bedroom*, before entry of the bathroom, they did not have probable cause or reason to believe that Troise was anywhere within the Petitioner's residence. The facts to support this contention are set out in detail under the discussion *infra* of REASONS FOR GRANTING THE WRIT.

After a non-jury trial, the Petitioner, who had received a severance from her co-defendants, was acquitted on the charge of conspiracy to import and possess cocaine but convicted on the charge of possession of cocaine with intent to distribute same. The evidence seized from the master bathroom of her residence was introduced at her trial over her objection.

The Petitioner appealed her conviction to the Fifth Circuit Court of Appeals. In its original opinion, the Fifth Circuit concluded that under the circumstances of the instant case, the officers *search* warrantless entry of the Petitioner's residence violated her Fourth Amendment rights. In reaching this conclusion, the Fifth Circuit stated as follows:

> "We are unable to see a distinction valid for fourth amendment purposes between entry to search for . . . an object and entry to apprehend a guest. Consequently, logic demands that the rules governing searches should apply with equal force to an arrest entry *into a third party's home.* If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances or some other established exception to the warrant requirement obtained. Any other result raises the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed. Furthermore, a requirement of exigent circumstances will not unduly burden law enforcement officials or create additional danger, since such factors are given considerable weight in the exigent circumstances determination."
>
> *United States -v- Cravero*, Appendix pg. 16-17 (Emphasis added).

In reaching this conclusion, the Fifth Circuit rejected the notion that the existence of an *arrest* warrant for a suspect who the police have probable cause to believe has wandered into a third party's home can, for Fourth Amendment purposes, be an acceptable substitute for a *search* warrant authorizing entry of the third party's home to search for the suspect:

> ". . . because in the nature of the things, nothing in the process of procurring an arrest warrant for A considers or affords any protection to the entirely distinct Fourth Amendment right of B, into whose premises A may wander — perhaps after the arrest warrant issues — not to have B's premises invaded and ransacked for A without either a warrant or one of the customary excuses for its absence. As a general rule, before entering a specific place to conduct a search for 'objects,' police officers must obtain a search warrant, *Agnello -v- United States*, 269 U.S. 20, 32-33(46 S.Ct. 4, 70 L.Ed. 145 (1925), which

thereby insures a prior judicial determination that there is probable cause to believe that the object sought is within the place to be searched, *Jones -v- United States*, 357 U.S. 493, 498, 78 S.Ct., 1253, 2 L.Ed. 2nd 1514 (1958). In contrast, no such determination need be made before an arrest warrant issues. Such a warrant requires only a judicial determination that there is probable cause to arrest a named person for a certain offense, without consideration the place in which the arrest is to be made. An arrest warrant, therefore, in and of itself, imposes few or no limitations on the power of police to enter private homes in search of suspects." *United States v. Cravero*, Appendix pg. 14-15.

Despite its original opinion that the *search* warrantless entry of the Petitioner's residence violated her Fourth Amendment rights, the Court, in what later on rehearing was termed a "seeming paradox", concluded that the evidence seized from her home was properly admitted into evidence at her trial. The Court's reasoning was as follows:

> "Possession of the arrest warrants was a completely self-validating justification for the arrest regardless of the circumstances under which the police reached the located where they served the warrants. . . . Thus, the arrests are valid, though the method of effecting them be not." *Id.*, at Appendix pg. 18.

After concluding that the arrests of Cravero and Chandler were legal, the Court upheld the police officers'

search of the master bedroom and bathroom of Petitioner's residence as, "a protective sweep to avoid threats from unknown persons." The Court then concluded that the officers having obtained entry into the master bathroom lawfully, properly seized the incriminating evidence observed there in plain view.

Petitioner Cook moved the Court for a rehearing suggesting that once the Court had concluded that the entry of her residence violated her Fourth Amendment rights, the evidence subsequently seized could not be admitted into evidence against her.

In its opinion on rehearing, the Court admitted that the logic of its original opinion created a "seeming paradox". This admission, however, did not benefit the Petitioner because rather than correcting the paradox the Court concluded that it had erred in its original opinion when it held that under the circumstances of this case the officers were required by the Fourth Amendment to obtain a search warrant before they entered Petitioner's residence.

The Court concluded:

> "Upon reconsideration of this seeming paradox, we find that we erred in requiring probable cause plus exigent circumstances to validate the entry without a search warrant . . .

> The law of this circuit, which our panel opinion overlooked, is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. *United States -v- James*, 528 F.2d 999, 1017 5th Cir. 1976); *Rodriguez -v- Jones*, 473 F.2d 599, 605-06 (5th Cir.), *cert. den.*, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007, (1973).
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> *United States -v- Cravero*, Opinion on Rehearing, Appendix Pg. 29-30.

This Petition for Writ of Certiorari seeks review of the Fifth Circuit conclusions (1) that the existence of an arrest warrant and reasonable belief by a police officer that the suspect is within the residence of a third party, satisfies Fourth Amendment requirements for a *search* warrantless search of that residence for the suspect; and, (2) that the warrantless search of the master bathroom of Petitioner's residence after the arrests of Cravero and Chandler in the living room area, was reasonable under the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW WHICH AFFECTS THE RIGHTS OF ALL PERSONS ENTITLED TO THE PROTECTION OF THE FOURTH AMENDMENT AND THE OBLIGATIONS OF GOVERNMENTAL ENTITIES TO PROTECT THOSE RIGHTS.

The importance of the issues presented in this case cannot be over emphasized when one recognizes that they involve the right of police officers to thrust themselves into a home which Justice Jackson long ago characterized as, ". . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson -v- United States*, 333 U.S. 10, 14 (1948).

All inhabitants of our country are affected by a decision regarding when a police officer rather than a magistrate can determine whether the right of privacy in one's dwelling must yield to the right of police officers to search. The instant case involves just such a decision.

There can be no dispute with the proposition that arbitrary invasion by government of the privacy of one's home or dwelling is what the Fourth Amendment was designed to safeguard against. *United States -v- United States District Court*, 407 U.S. 297 (1972). The search warrant requirement of the Fourth Amendment was inter-

posed by the Framers because of the belief that the decision whether a citizen's right of privacy should yield to a policeman's right to enter and search should rest with a neutral judicial officer and not with the policeman.

Only in certain carefully defined exceptions, has this Court permitted the policeman rather than the magistrate to decide when the citizen's right to privacy should be invaded. These exceptions have been characterized frequently as "exigent circumstances".[4]

As stated by the Fifth Circuit in its original opinion,

> "This preference for a prior judicial determination should control a contemplated entry of a third party's home, regardless of what is sought. While the ultimate objective of an arrest entry is an arrest, the arrest can only be effected if the subject is first found, and thus, a search is a necessary factual prerequisite to the possible arrest." *United States -v- Cravero*, Appendix pg. —.

None of the well recognized exceptions to the search warrant requirement[5] are present in the instant case. In-

[4]Terms like "exigent circumstances" are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant and that it is only in the light of those circumstances and that need, that the warrantless search meets the ultimate test of avoiding condemnation under the Fourth Amendment as "unreasonable." *Dorman v United States*, 435 F.2d 385 (D.C. Cir. 1970).

[5]*In Vale -v- Louisiana*, 399 U.S. 30 (1970), this Court had occasion to note most of these exceptions to the search warrant requirement:

> "There is no suggestion that anyone consented to the search. Cf. *Zap -v- United States*, 328 U.S. 624, 628, 66 S.Ct. 1277, 1279, 90 L.Ed. 1477. The officers were not responding to an emergency. *United States -v- Jeffers, supra*, 243 U.S. at 52, 72 S.Ct. at 95; *McDonald -v- United States, supra*, 335 U.S.

deed, the Fifth Circuit, as already noted, so found. The Petitioner's house was surrounded by at least fifteen police officers for approximately four and a half hours prior to the time entry was made. There was absolutely no possibility of escape. The four and a half hour delay between the time the police arrived at Petitioner's residence and the time they entered, makes it crystal clear that the need to arrest Cravero and Chandler was not exigent. There was absolutely no valid reason presented by the facts of this case to justify the failure to obtain a judicial determination prior to entry of Petitioner's residence that there was probable cause or reason to believe that Cravero, Chandler or Troise was present within.

Admittedly, the officers had an extremely high degree of probable cause to believe that Cravero and Chandler were within the Petitioner's residence. This, however, can never be justification for a warrantless search absent exigent circumstances.

> ". . . no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises

at 454, 69 S.Ct. at 192. They were not in hot pursuit of a fleeing felon. *Warden -v- Hayden*, 387 U.S. 294, 298-299, 87 S.Ct. 1642, 1645-1646, 18 L.Ed. 2d 782; *Chapman -v- United States*, 365 U.S. 610, 615, 81 S.Ct. 776, 779, 5 L.Ed. 436. The goods ultimately seized were not in the process of destruction. *Schmerber -v- California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed.2d 908; *United States -v- Jeffers, supra; McDonald -v- United States, supra*, 335 U.S. at 455, 69 S.Ct. at 193. Nor were they about to be removed from the jurisdiction. *Chapman -v- United States, supra; Johnson -v- United States, supra; United States -v- Jeffers, supra.*" *Id.* at 34.

> belonging to a criminal suspect may establish the fullest measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the rule that the police may not enter and make a warrantless seizure." *Coolidge -v- New Hampshire*, 403 U.S. 443, 468 (1971).

Absent exigent circumstances, there is no valid distinction under the Fourth Amendment between invasion of one's privacy to search for an object or to search for a guest in the home of a third party. The decision of the Fifth Circuit on this issue violates the principle of the Fourth Amendment, ". . . which often is not grasped by zealous officers . . ." *Johnson -v- United States, supra*, at 13, *i.e.*, inferences which reasonable men draw from evidence must be drawn by a neutral magistrate instead of being judged by the officer engaged in frequent over zealous efforts to ferret out crime.

Assuming arguendo, that the arrests of Cravero and Chandler were lawfully executed, the officers subsequent search of the master bathroom area of the Petitioner's residence was clearly beyond the scope permitted by the principles enunciated by this Court in *Chimel -v- California*, 395 U.S. 752 (1965).

The Fifth Circuit did not consider Petitioner's contention that there was no probable cause or reason to believe that Donald Troise was within the Petitioner's home, but upheld the search, ". . . because [the officers'] bathroom entry can survive as a protective sweep to avoid threats from unknown persons." The Court relied upon a recent series of Fifth Circuit cases which have carved out

an exception to the *Chimel* principle limiting the scope of searches incident to arrest. *United States -v- Looney*, 481 F.2d 31, 33 (5th Cir.) *cert. den.*, 414 U.S. 1070 (1973); *McGeehan -v- Wainwright*, 526 F.2d 397 (5th Cir. 1976); *United States -v- Smith*, 515 F.2d 1028 (5th Cir. 1975); *United States -v- Erwin*, 507 F.2d 937 (5th Cir. 1974).

The instant case is clearly distinguished from the "protective sweep" cases cited by the Fifth Circuit for the simple reason that the record unequivocally establishes that the only reason proffered by the government at the Motion to Suppress hearing and the trial to justify the police officers' entry into the Petitioner's master bedroom and bathroom was to search for the fugitive Donald Troise. There is no evidence in the record of the instant case that the officers searched the master bedroom because they reasonably believed, "that at serious threat to safety [was] presented." *United States -v- Smith, supra*, at 1031. The Fifth Circuit has, thus, applied their "protective sweep" exception to *Chimel* when the record has failed to demonstrate that a serious demonstrable threat to the officers safety was present and where the only proffered justification for the search was the hunt for Troise. The result, therefore, is that the Fifth Circuit has carved out an absolute rule that whenever entry of a residence is made for the purpose of effecting an arrest, the residence may be completely sweeped (searched) to look for persons that *may* pose a threat to the safety of an officer without any evidentiary support therefor.

The record reveals the following with regard to whether the officers at the moment of entry of the master bedroom of Petitioner's residence had probable cause to believe Troise was within Petitioner's residence:

When Cravero, Chandler and Willets left the restaurant in Broward County, Florida on the evening of July 14, 1974, they were positively identified entering a brown Oldsmobile which the evidence showed was owned by a co-defendant named Philip Siegel. The vehicle was followed to a parking lot at a Howard Johnson's Motel in North Miami Beach. Four agents testified that between the restaurant in Broward County and the Howard Johnson's parking lot, the vehicle was occupied by four persons. Two other agents testified that they observed five individuals in this vehicle during this same period. A total of five different persons were positively identified by the surveilling officers as having been in the vehicle at that time, *i.e.*, Cravero, Chandler, Willets, Troise *and Siegel.*

When the vehicle arrived at the Howard Johnson's parking lot the undisputed testimony was that all of the occupants exited the vehicle. When it subsequently left the Howard Johnson's parking lot and proceeded to Petitioner's residence, Cravero, Chandler and Willets were positively identified as occupants of the vehicle at that time by two officers. Other testimony by officers Havens and an aerial surveillance officer named Riggio, established that there were only four occupants in the vehicle when it arrived at the Petitioner's residence. Four persons were observed exiting the vehicle and entering Petitioner's residence. The evidence also unequivocally established that Philip Siegel, the owner of the brown Oldsmobile, who was previously identified as having been in that vehicle when it left the restaurant in Broward County, was positively identified leaving the Petitioner's residence and driving off in the brown Oldsmobile shortly after that vehicle arrived at the Petitioner's residence that evening.

The inescapable conclusion to be drawn from this uncontroverted evidence, known by the officers before they entered Petitioner's residence, is, therefore, that the four occupants of the brown Oldsmobile that arrived at the Petitioner's residence that night were Cravero, Chandler, Willets and Siegel. Troise had exited the vehicle at the Howard Johnson's parking lot which fact was obviously known to the officers when they arrived at the Cook residence because two officers were immediately assigned to return to the Howard Johnson's parking lot to search for Troise.

There was simply no legitimate reason for the officers to enter and search the master bedroom and bathroom of the Petitioner's residence after Cravero and Chandler were arrested and handcuffed in the living room area. No evidence of danger was even proffered. The officers knew from all available information that Donald Troise was not present within the Petitioner's home.

II

THE DECISION BELOW CONFLICTS WITH THE OPINIONS OF THE THIRD CIRCUIT IN *GOVERNMENT OF THE VIRGIN ISLANDS -v- GEREAU*, 502 F.2d 914 (3rd Cir. 1974) AND THE EIGHTH CIRCUIT IN *RICE -v- WOLFF*, 513 F.2d 1280 (8th Cir. 1975), *AFF'D SUB. NOM. STONE -v- POWELL*, ___ U.S. ___, 96 S.Ct. 3037 (1976).

In *Rice -v- Wolff*, 513 F.2d 1280 (8th Cir. 1975), the Eighth Circuit stated:

"Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries precisely the same fourth amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence. Thus, 'arrest warrants are not substitutes for search warrants.'" *Id.* at 1291-1292

Also in *Government of Virgin Island -v- Gereau*, 502 F.2d 914 (3rd Cir. 1974), the Third Circuit stated:

"The Government claims that its entry was lawful because the search was intended to find persons for whom the Government possessed arrest warrants, the two Puerto Ricans implicated by Smith and Gereau. This Court has made clear, however, that arrest warrants are not substitutes for search warrants. * * * Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects *only in exigent circumstances* where the police officers also have probable cause to believe that the suspects may be within." (Emphasis added) *Id.* at 298.

The Fifth Circuit has now as a result of their opinion on rehearing in the instant case, placed themselves diametrically opposed to the views of the Third and the Eighth Circuit in *Rice* and *Gereau*.

III

THE DECISION BELOW PRESENTS IMPORTANT CONSTITUTIONAL ISSUES WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This Court has never before dealt with the significant issues presented by the instant case. As the Fifth Circuit stated in its original opinion, ". . . what requirements must be satisfied before policemen without a search warrant may conduct a search of a third person's private home for a suspect for whom they have a valid arrest warrant are unsettled." *United States v. Cravero*, Appendix pg. 12-13.

In *United States v Watson*, ____ U.S. ____, 96 S.Ct. 820 (1976) the concurring opinions of Justices Stewart and Powell noted that this Court clearly has left open the question of whether or when the police can lawfully make a warrantless arrest in a private place. Identical constitutional considerations relevant to the issue left open in *Watson* are applicable to the search warrant issue presented in the instant case insofar as the Petitioner Cook is concerned. This is so because nothing in the process of obtaining *arrest* warrants for Cravero and Chandler provided any protection whatsoever to the entirely distinct Fourth Amendment right of the Petitioner Cook not to have her privacy invaded without a search warrant or one of the customary excuses for its absence.

Additionally, the Fifth Circuit's application of its "protective sweep" exception to *Chimel* in this case is totally unwarranted and represents an intention in that Circuit to carve out an absolute exception to *Chimel* re-

gardless of whether the record supports justification therefor. This Court should utilize the instant case as an opportunity to clarify the principles previously enunciated in *Chimel*; to determine whether the "protective sweep" theory is compatible with those principles; and, if so, to set forth proper guidelines for application of this exception.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 75-2718.

UNITED STATES of America,
Plaintiff-Appellee,
v.

Richard Douglas CRAVERO, a/k/a "Ricky," Sharon Willets, Marianne Cook, Phillip Siegal, Ronald Clifford Chandler, and Bobby Eugene Miller, Defendants-Appellants.

Aug. 6, 1976.

Before BROWN, Chief Judge, TUTTLE and GEE, Circuit Judges.

GEE, Circuit Judge:

One or more of appellants challenge their convictions for various narcotics-related offenses[1] on each of the fol-

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[1]The indictment charged, inter alia, conspiracy to import and possess cocaine and marijuana with intent to distribute, in violation of 21 U.S.C. §§846, 963 (1970) (Count I); importation of cocaine and marijuana in violation of 18 U.S.C. §2 (1970) and 21 U.S.C. §952(a) (1970) (Count II); possession of cocaine with intent to distribute, in violation of 18 U.S.C. §2 (1970) and 21 U.S.C. §841(a)(1) (1970) (Count IV); and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. §848 (170) (Count V). Appellants were convicted as follows: Cravero, Counts I, II, IV, and V (consecutive sentences on the first three counts; concurrent sentence on Count V); Chandler, Counts I, II, IV, and V (same as Cravero); Willets, Counts I, II, and IV (concurrent sentences); Siegal, Counts I and II (concurrent sentences); Miller, Counts I and II (concurrent sentences); and Cook, Count IV.

lowing grounds: (1) the indictments should have been quashed because the Department of Justice Strike Force attorney who obtained them was not appointed directly by the Attorney General, and his blanket authorization to prosecute violations of federal criminal statutes failed to provide the statutorily-required specific designation of authority to conduct the grand jury inquiry; (2) the "continuing criminal enterprise" statute, 21 U.S.C. §848 (1970), which formed the basis of one count in the indictment, is unconstitutionally vague; (3) each appellant's motion for a judgment of acquittal on all counts should have been granted because the evidence fails to support the convictions on any count; (4) appellants Siegal and Miller should have been granted a severance; (5) the narcotics and related paraphernalia introduced at trial were illegally seized and should have been suppressed; (6) the hearsay declarations of an indicted co-conspirator who had previously been acquitted should not have been admitted; (7) the prosecutor improperly cross-examined a defense witness; and (8) newly discovered evidence justifies a new trial for appellant Cook. We state the facts pertinent to each point as we discuss it. The convictions are affirmed.

I. Prosecuting Attorney's Authorization to Conduct Grand Jury Inquiry

[1, 2] All appellants contend that the Department of Justice Organized Crime Strike Force attorney who presented the case to the grand jury was neither "specially appointed" nor "specifically directed" by the Attorney General to conduct the grand jury inquiry as required by 28

U.S.C. §515(a) (1970),[2] because he was appointed by an Assistant Attorney General and because his letter of authorization failed to designate the type of case to be prosecuted. Both grounds of attack fail. First, 28 U.S.C. §510 (1970) permits the Attorney General to delegate to any other Department of Justice official "any function of the Attorney General," which includes the power to appoint special attorneys under section 515(a).[3] And by regulation C.F.R. §§0.55, 0.60 (1974), the Attorney General delegated to the Assistant Attorney General in charge of the Criminal Division, who signed the authorization here, the power to designate attorneys to present evidence to grand juries in all cases under his control. See In re Persico, 522 F.2d 41, 67 (2d Cir. 1975). Second, the letter of authorization, which "specially authorized and directed" the special attorney to investigate "violations of Federal Criminal Statutes by persons whose identities are unknown" in the Southern District of Florida and other judicial districts and "to conduct . . . any kind of legal proceedings, . . . including Grand Jury Proceedings . . . , which United States attorneys are authorized to conduct," is identical in language to the authorization that we recently upheld in United States v. Morris, 532 F.2d 436, 439-40 (5th Cir. 1976). We adhere

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[2]Which reads as follows:

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought. (emphasis added)

[3]Accord, United States v. Agrusa, 520 F.2d 370, 371-72 (8th Cir. 1975).

to Morris and hold that the authorization need not mention the parties or the particular federal statutes[4] under which the indictment was sought.

II. Unconstitutional Vagueness of the Continuing Conspiracy Statute

[3] Appellants Chandler and Cravero argue that the "continuing criminal enterprise" statute, 21 U.S.C. §848 (b)(2) (1970), which makes a crime any violation of the statute if

> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources[,]

is unconstitutionally vague in using the terms (1) "a continuing series of violations," (2) "a position of organizer, a supervisory position, or any other position of management," and (3) "substantial income or resources." The Second and Sixth Circuits have upheld the statute against precisely this attack in United States v. Manfredi, 488 F.2d 588, 602-03 (2d Cir. 1973), cert. denied, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974), and United

[4]Morris dealt only with failure to specify the statutes, but its language, rationale, and supporting authority extend to parties as well, and we so hold.

States v. Co[illegible], 493 F.2d 327 (6th Cir.), cert. denied, 419 U.S. 831, 95 S.Ct. 56, 42 L.Ed.2d 57 (1974) (quoting Manfredi as the sole basis for its decision).[5] We agree with these decisions on the grounds stated in Manfredi:

> The conduct reached is only that which the violator knows is wrongful and contrary to law. See Screws v. United States, 325 U.S. 91, 102, 65 S.Ct. 1031, 1935, 89 L.Ed. 1495 (1945). . . .
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> . . . Here . . . the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better expresses the congressional purpose. To sustain [appellant's] position would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands; we feel that not to be the case and that, as applied to the conduct with which [appellant] was charged . . . the statute is not unconstitutionally vague.

488 F.2d at 602-03.

[5]Defendants would distinguish these decisions on the grounds that in those cases there was sufficient proof of other violations and substantial income derived from those violations. But there is adequate proof that defendants in this case were "in a supervisory position," that they derived substantial income from these operations, and that there were continuing violations. Furthermore, whether there is proof of these elements concerns sufficiency of the evidence, not vagueness of the statute.

III. Sufficiency of the Evidence

[4] All appellants challenge the sufficiency of the evidence to support their convictions on each count and claim that the lower court erred in refusing to grant any of their frequent motions for judgment of acquittal. But the evidence on each count so easily satisfies this circuit's test of sufficiency in reviewing a lower court's denying a motion for judgment of acquittal—that reasonable minds could conclude that the evidence is inconsistent with the hypothesis of innocence, see, e.g., United States v. Prout, 526 F.2d 380, 384 (5th Cir. 1976)—that we feel obliged to discuss only Cook's argument that the prosecution proved no more than her presence on the scene. Although "[m]ere presence at the scene of a crime . . . is not enough to prove participation in it," United States v. James, 528 F.2d 999, 1013 (5th Cir. 1976), Cook ignores not only evidence of the substantial nature of the narcotics-processing operation in her home, but also the presence of her fingerprints on most of the processing paraphernalia found in her bathroom and the discovery[6] of a number of packets containing cocaine and marijuana cigarettes in her bathroom, master bedroom, and living room. Viewing all this evidence and reasonable inferences therefrom in a light most favorable to the government, see Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.2d 680, 704 (1942), we think that the government sufficiently proved constructive possession under section 841(a)(1).[7]

[6]By police officers acting pursuant to a search warrant obtained several hours after the arrest.

[7]Cf. United States v. Garza, 531 F.2d 309, 310-11 (5th Cir. 1976) (section 841(a) is violated by constructive possession, which may be shared with other and proved by circumstantial evidence). See also United States v. Harold, 531 F.2d 704 (5th Cir. 1976) (per curiam).

IV. Denial of Severance

[5, 6] Appellants Siegal and Miller, charged only with importation and conspiracy to import and possess with intent to distribute, object to the lower court's refusal to sever them from Cravero, who was charged additionally with possession and a continuing criminal enterprise.[8] But they were properly joined with Cravero under Fed.R.Crim. P. 8(b),[9] since all were charged with participating in "the same series of acts or transactions constituting an offense or offenses." Having been properly joined, their motion for severance was committed to the trial court's sound discretion, and denial of a severance will not be reversed unless appellants meet the heavy burden of demonstrating clear prejudice. See, e.g., United States v. Crockett, 514 F.2d 64, 70 (5th Cir. 1975). Their claim is that they were prejudiced by the introduction of evidence aimed solely at proving Cravero's guilt on the two additional counts, by Cravero's notoriety, by an inability to call other co-defendants as witnesses, and by the general strategic inferiority of a joint trial. But they proved no such prejudice. First, while some evidence was introduced solely to prove Cravero's guilt on the additional counts, neither appellant demonstrated either a "clear likelihood of confusion on the part of the jury to his prejudice," see Gordon v. United States, 438 F.2d 858, 879 (5th Cir.), cert. denied, 404 U.S. 828,

[8]See note 1 supra.

[9]Which reads as follows:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (emphasis added)

92 S.Ct. 63, 30 L.Ed.2d 56 (1971) (citing cases), or an antagonistic defense, see United States v. Johnson, 478 F.2d 1129, 1131-34 (5th Cir. 1972); United States v. Wilson, 451 F.2d 209, 215 (5th Cir. 1971).[10] Second, although local newspapers published several potentially prejudicial news stories before and during trial, appellants have demonstrated no inherent prejudice in the trial setting or actual prejudice from the jury selection process, see Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and the lower court took every possible measure to safeguard appellants, repeatedly warning the jurors to avoid all news sources and carefully examining the jury members to insure that his instructions had been followed. See United States v. Scallion, 533 F.2d 903, (5th Cir. 1976); United States v. Edwards, 488 F.2d 1154, 1160 (5th Cir. 1974). Third, appellants' objection to their inability to call other co-defendants as witnesses fails because they did not meet the requirements outlined in United States v. Cochran, 499 F.2d 380 (5th Cir. 1974), cert. denied, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975):

> (1) the testimony must be exculpatory in effect; (2) the testimony must be more than purely cumulative, or of negligible weight or probative value; and (3) there must be a likelihood that the co-defendant[s] will be willing to testify if the [defendants are] tried separately.

Id. at 392, citing Byrd v. Wainwright, 428 F.2d 1017, 1020-21 (5th Cir. 1970). Finally, "that a separate trial

[10]The trial judge carefully instructed the jury to consider separately the evidence concerning each defendant on each count. Furthermore, he advised the jury during trial and in final instructions about the limitations on the use of co-conspirators' hearsay declarations.

might have offered [appellants] a strategic advantage over a joint trial does not suffice to demonstrate the unfairness of the joint trial." United States v. Clark, 480 F.2d 1249, 1253 (5th Cir.), cert. denied, 414 U.S. 978, 94 S.Ct. 301, 38 L.Ed.2d 222 (1973); see United States v. Perez, 489 F.2d 51, 67 (5th Cir. 1973), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974).

V. Search and Seizure of Narcotics During Arrest

On July 14, 1974, acting on information supplied by a goverment informant, federal agents observed Chandler and Cravero, for whom arrest warrants were then outstanding,[11] and Willets arrive at a restaurant at 7:00 p.m. for a meeting with the informant. After the meeting, Chandler, Cravero, and Willets left the restaurant and drove to Cook's house. Agents followed them and placed the house under surveillance beginning at approximately 9:30 p.m. At 1:15 a.m., two agents with arrest warrants for Chandler, Cravero, and a third man named Troise, knocked on the front door of Cook's house, identified themselves, and announced that they had arrest warrants. A short time later, Cook opened the door; and after a short exchange she shouted, "Hey, you guys, the police." The agents immediately entered, without permission, saw Cravero in the living room, and arrested him. They also noticed Chandler standing in the doorway to the master bedroom within reach of a pistol. As they arrested Chandler and confiscated the pistol, they heard scuffling sounds coming from an adjacent bathroom. Cook sought to prevent the agents from entering the bathroom without a search warrant, but they announced that they had an arrest

[11]This was the first time that the agents had located them since obtaining the warrants.

warrant for Troise, a fugitive whom they claimed to believe to be hiding in the house. Entering the bathroom with weapons drawn,[12] the agents first observed Willets leaning into the shower stall and then saw a metal tray containing a large quantity of white powder that proved to be cocaine on the shower floor in plain view and paraphernalia used in the processing and packaging of narcotics[13] on the counter next to the sink. After checking the shower stall unsuccessfully for Troise, the agents seized the cocaine and paraphernalia.

Cook, Chandler, Cravero, and Willets challenge this seizure[14] on the following grounds: (1) the police unreasonably delayed execution of their arrest warrants so as to use them as a pretext to search Cook's house at a time when narcotics were to be found; (2) absent exigent circumstances, the police could not execute arrest warrants at the residence of a third party not named in the warrants even if there was probable cause to believe that the subjects of the warrants were on the premises; and (3) the police conducted an improper housewide exploratory search after arresting Cravero and Chandler, there being

[12]Since Troise had a reputation for violence and was reportedly heavily armed.

[13]Much of which bore cocaine residue.

[14]Appellants Siegal and Miller also object to the seizure, but since neither was present at the home at the time of the seizure and neither claimed ownership or possession of the confiscated narcotics and paraphernalia, we agree with the lower court that neither had the reasonable expectation of freedom from government intrusion on the premises necessary to give either standing to challenge the search and seizure. See Combs v. United States, 408 U.S. 224, 227, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972); United States v. Hunt, 505 F.2d 931, 934-40 (5th Cir. 1974), cert. denied, 421 U.S. 975, 95 S.Ct. 1974, 44 L.Ed.2d 466 (1975); United States v. Colbert, 474 F.2d 174, 176-77 (5th Cir 1973) (en banc).

no probable cause to believe either that (a) the third person named in the arrest warrants, Troise, was present at Cook's house, or that (b) any unknown third person poised a threat to the agents' physical safety.

(1) Unreasonable delay in executing the arrest warrant.

[7] First, appellants complain that the police had numerous opportunities to arrest Cravero and Chandler before their arrival at Cook's house and arguably could have waited again until after they left the house. This circuit has held, however, relying on Hoffa v. United States, 385 U.S. 293, 310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966), that a suspect has no constitutional right to be arrested earlier than the police choose, since the authorities may not be forced to halt an investigation once they have probable cause to arrest but before they have evidence necessary to support a conviction. United States v. Palazzo, 488 F.2d 942, 948 (5th Cir. 1974); Koran v. United States, 469 F.2d 1071 (5th Cir. 1972) (per curiam).[15] While delaying an arrest as a pretext to apprehend a suspect when he has evidence in his possession may be constitutionally questionable,[16] we need not reach that

[15]Although both Palazzo and Koran concerned pre-warrant arrests, the distinction is not critical. See generally United States v. Watson, ___ U.S. _____, 96 S.Ct. 820, 46 L.Ed.2d 598, 613-14 & nn. 4-5 (1976) (Powell, J., concurring).

[16]See United States v. Palmer(435 F.2d 653, 655 (1st Cir. 1970) (dicta) (by implication); Amador-Gonzalez v. United States, 391 F.2d 308, 314-15 (5th Cir. 1968) (impermissible for narcotics officers to make traffic arrest as pretext to search defendant's car incident to arrest). But cf. United States v. Frick, 490 F.2d 666, 670-71 (5th Cir. 1973), cert. denied, 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974) (suggesting that a "staged arrest" after indictment to apprehend defendant when he has evidence in his possession is permissible so long as the arrest occurs within a reasonable time after indictment, but noting that the evidence failed to show that the arrest was staged).

issue since no evidence of pretext is present here. The agents justifiably refrained—to protect their informant's identity—from arresting Chandler and Cravero at the restaurant. They did not know appellants' destination after the group left the restaurant. Nor had the officers especial reason to expect to find cocaine in Cook's house.[17] The agents entered to execute their warrants only after realizing that Cravero suspected the informant's true role[18] and concluding that the suspects intended to remain inside indefinitely.[19] Thus, the delay was reasonable and fully justified.

(2) Execution of arrest warrant on premises of third party.

[8] Second, appellants insist that the police could not execute their arrest warrants on Cravero and Chandler by entering Cook's residence. As the Eighth Circuit recently noted in Rice v. Wolff, 513 F.2d 1280, 1292 n. 7 (8th Cir.), aff'd sub nom. Stone v. Powell, — U.S. —, 96 S.Ct. 3037, 48 L.Ed.2d — (1976), what requirements must be satisfied before policemen without a search warrant may conduct a search of a third person's private home for a suspect for whom they have a valid arrest warrant are

[17]The informant had never ascertained the hiding place of the cocaine.

[18]Based on a phone conversation at 11:20 that night in which Cravero told the informant that he had detected the presence of surveillance units at the restaurant and intimated that he was aware of the informant's duplicity.

[19]Moreover, it seems that had the officers intended an exploratory search, they would have shut off the house water supply before entering, a common measure against disposal of contraband.

unsettled.[20] All circuits that have considered the question,[21] including this one,[22] agree that at minimum there must be probable cause to believe that the suspect is within the dwelling, but whether there must be exigent circumstances as well is an open question.[23] Since no exigent circumstances are present in this case,[24] we must now address that issue.

[20]Cf. United States v. Watson, ____ U.S. ____, 96 S.Ct. 820, 46 L.Ed.2d 598, 614 (1976) (Stewart, J., concurring); id. at 614 & n. 7 96 S.Ct. 820 (Powell, J., concurring); Rodriguez v. Jones, 473 F.2d 599, 605-06 (5th Cir.), cert. denied, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973) (dicta) action for damages under §1983; exigent circumstances present). See also United States v. Watson, supra ____ U.S. ____, 96 S.Ct. 820, 48 L.Ed.2d at 605 n. 6.

[21]Rice v. Wolff, 513 F.2d 1280, 1292 (8th Cir.), aff'd sub nom. Stone v. Powell, — U.S. —, 96 S.Ct. 3037, 48 L.Ed.2d — (1976); Fisher v. Volz, 496 F.2d 333, 338-42 (3d Cir. 1974); United States v. Brown, 151 U.S.App. D.C. 365, 467 F.2d 419, 423-24 (D.C.Cir. 1972); United States v. McKinney, 379 F2d 259, 263 (6th Cir. 1967); Lankford v. Gelston, 364 F.2d 197, 202-03 n. 6 (4th Cir. 1966) (en banc) (citing cases). See also United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974) (warrantless entry).

[22]E. g., United States v. James, 528 F.2d 999, 1017 (5th Cir. 1976).

[23]In United States v. James, 528 F.2d 999 (5th Cir. 1976), after appearing to answer this question in the negative, the court recognized the presence of exigent circumstances in denying the petition for rehearing.

[24]The government argues that the possibility of escape, the grave nature of the offense, and the suspects' propensity for violence supplied the requisite exceptional circumstances. But Chandler and Cravero were pent in a house surrounded by police. And danger to third persons cannot support the entry here because there was no proof of danger; furthermore, all three suspects named in the warrant had been together and much more vulnerable both at the restaurant and in the car. The police correctly suggest that the delay in executing the warrants was necessary to protect their informant's identity; but while this justifies the initial delay, it does not make exigent the need to arrest Chandler and Cravero while they remained inside the house. Although the arrest may also have been delayed—and understandably so—to give the informant time to determine the location of the cocaine, this could not

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[9] The opinions of other circuits that have faced this issue do not speak with one voice.[25] We think it clear, however, that in addition to probable cause to believe that the suspect is inside, there must be exigent circumstances to support an entry to make a warranted arrest in a third party's home. We think so because in the nature of things nothing in the process of procuring an arrest warrant for A considers or affords any protection to the entirely distinct fourth amendment right of B, into whose premises A may wander—perhaps after the arrest warrant issues—not to have B's premises invaded and ransacked for A

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supply sufficient justification for the police entering Cook's house when they did, unless perhaps they had feared that evidence was threatened with destruction. See Schmerber v. California, 384 U.S. 757, 770-71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). That possibly dangerous felons who are guests in a private home suspect earlier police surveillance is not enough to present exigent circumstances when the suspects are unaware of current police presence.

[25]The Third Circuit requires probable cause and exigent circumstances. Government of the Virgin Islands v. Gereau, 502 F.2d 914, 928-29 (3d Cir. 1974), cert. denied, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975); see Fisher v. Volz, 496 F.2d 333, 338-39 (3rd Cir. 1974). The Fourth Circuit has approached but avoided the issue. Lankford v. Gelston, 364 F.2d 197, 205-06 (4th Cir. 1966). The District of Columbia Circuit (per Justice Clark) in United States v. Brown, 151 U.S.App.D.C. 365, 467 F.2d 419, 423-24 (1972), a holding that probable cause to believe the suspect inside a third party's dwelling is sufficient, makes no explicit reference to exigent circumstances; but a Third Circuit decision correctly points out that "[Brown's] discussion reveals that such circumstances were considered in determining the existence of probable cause," Fisher v. Volz, supra at 341 n.12. The Sixth Circuit in United States v. McKinney, 379 F.2d 259, 263 (6th Cir. 1967), declared that "there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance," but this statement must be considered in context since the police there had looked unsuccessfully for the suspect before having probable cause to believe him present in someone else's house. And the court implied that more than mere presence is required. Id. at 263 n.3. See also Note. The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stan.L.Rev. 995 (1971) (concerned mainly with warrantless arrests).

without either a warrant or one of the customary excuses for its absence. As a general rule, before entering a specific place to conduct a search for "objects," police officers must obtain a search warrant, *Agnello v. United States*, 269 U.S. 20, 32-33, 46 S.Ct. 4, 70 L.Ed. 145 (1925), which thereby insures a prior judicial determination that there is probable cause to believe that the object sought is within the place to be searched, *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958). In contrast, no such determination need be made before an arrest warrant issues. Such a warrant requires only a judicial determination that there is probable cause to arrest a named person for a certain offense, without consideration of the place in which the arrest is to be made.[26] An arrest warrant, therefore, in and of itself imposes few or no limitations on the power of police to enter private homes in search of suspects.

[10, 11] But arbitrary invasion of the privacy of the home or dwelling is the "chief evil" to which the fourth amendment is directed.[27] To prevent such invasions, the Framers interposed a search warrant requirement between private citizens and the police, reflecting a belief that, ab-

[26]See, e. g., Fed.R.Crim.P 4(a): "If it appears from the complaint . . . that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it."

A warrantless arrest in a public place of one suspected of a felony requires a similar determination, but only by a police officer. See United States v. Watson, ____ U.S. ____, 96 S.Ct. 820, 46 L.Ed.2d 598, 603-09 (1976). See also Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 534 (1925).

[27]United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); see Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

sent special circumstances, the decision whether the right of privacy should yield to a right to enter and search a particular place should rest not with the policeman, but with a disinterested judicial officer whose approval for a search could apply only to a particular place and after a showing of probable cause.[28] Only in certain carefully-defined classes of cases is a warrantless search permitted.[29] This preference for a prior judicial determination should control a contemplated entry of a third party's home, regardless of what is sought. While the ultimate objective of an arrest entry is an arrest, the arrest can only be effected if the subject is first found, and thus a search is a necessary factual prerequisite to the possible arrest. A search warrant would be required, in the normal case and absent some exception, to enter a residence to search for a stolen pet or other object seen carried into it. We are unable to see a distinction valid for fourth amendment purposes between entry to search for such an object and entry to apprehend a guest. Consequently, logic demands that the

[28]McDonald v. United States, 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948). As Justice Jackson noted in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed 436 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

[29]E.g., Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

rules governing searches should apply with equal force to an arrest entry into a third party's home. If the policeman has probable cause to believe that a suspect he wishes to arrest is inside the home, he can demonstrate this to a magistrate and obtain a search warrant for the suspect. If he fails to obtain a warrant, then an arrest entry without a search warrant will be permissible only if exigent circumstances[30] or some other established exception to the warrant requirement obtains. Any other result raises the spectre of police circumvention of the search warrant requirement by using an arrest warrant as carte blanche to search any and every home in which they can claim probable cause to believe a suspect may be concealed.[31] Furthermore, a requirement of exigent circumstances will not unduly burden law enforcement officials or create additional danger, since such factors are given considerable weight in the exigent circumstances determination.[32]

[30]An obvious example of which would be entry by one believed dangerous into the home of another believed by the police not to be in league with him. Another, since objects do not act and people do, would be a reasonable fear by the police that the suspect in the house might be summoning reinforcements by telephone or other means of communication, or ordering retaliation on an informer or other criminal activity by such means.

[31]Cf. Chimel v. California, 395 U.S. 752, 767, 89 S.Ct. 2034, 23 L.E.d.2d 685 (1969).

[32]Cf. Dorman v. United States, 140 U.S..App. D.C. 313, 435 F.2d 385, 392-93 (1970) (en banc) (giving examples of exigent circumstances). We need not decide here whether our concern for balancing the needs of effective law enforcement with the potential for police abuse requires a similar rule governing an arrest entry into the home of a person named in a warrant, although we have previously implied that mere probable cause to believe the suspect present justifies such an entry. United States v. Jones, 475 F.2d 723, 729 (5th Cir. 1973) (dicta) (defendant conceded that arrest was lawful and challenged only the search incident to his arrest). See generally United States v. Watson, ____ U.S. ____, 96 S.Ct. 820, 46 L.Ed.2d 598, 605 n.6 (1976).

[12] Although we thus agree with appellants that the entry was illegal, their conclusion that the subsequently seized drugs and paraphernalia must be suppressed does not follow ineluctably from the illegality of the entry. Obviously, an illegal entry does not vitiate the arrests pursuant to concededly valid arrest warrants. If the arrests here had been illegal—*e.g.*, without a warrant or probable cause—then use of the fruits of those arrests would have entitled appellants to invoke the exclusionary rule. *See Edwards v. Swenson*, 454 F.2d 1106, 1111 (8th Cir.), *cert. denied*, 406 U.S. 909, 92 S.Ct. 1619, 31 L.Ed.2d 820 (1972) (citing Fifth Circuit and other cases). But the arrests, if not the entry, were proper. The arrest warrants represent judicial sanction of the deprivations of the suspects' liberties. Possession of the warrants was a completely self- validating justification for the arrests regardless of the circumstances under which the police reached the location where they served the warrants. To hold otherwise would mean that a suspected felon could claim what amounts to temporary sanctuary in the home of another and would require us to contemplate with equanimity the prospect of a section 1983 suit by him against the officers who arrested him on a valid warrant, which seems self-evidently absurd. Thus, the arrests are valid, though the method of effecting them be not.[33]

[13] The Supreme Court has held that items seized in warrantless searches incident to lawful arrests are admissible. Such searches are considered "reasonable" in fourth amendment terms because they are necessary to protect the arresting officers' safety and prevent the concealment or destruction of evidence, *See Chimel v. Califor-*

[33]Cf. United States v. Cisneros, 448 F.2d 298, 303 n.6 (9th Cir. 1971).

nia, 395 U.S. 752, 762-64, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). But the admissibility of items seized pursuant to other warrantless search exceptions, such as the "plain view" or "hot pursuit" doctrines, has turned on "an extraneous valid reason for the officer's presence." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2039, 29 L.Ed.2d 564 (1971).[34] *See also id.* at 465-66, 91 S.Ct. 2022. Thus, we must examine the reason for the officers' presence in the place where they made the seizures because the admissibility of evidence obtained in the warrantless search depends on whether the items were seized incident to the valid arrest or merely as part of an exploratory search of the premises after the illegal entry.

(3) *Exploratory search.*

[14, 15) Although Chandler does not seek suppression of the pistol found on his person,[35] all appellants object to the drugs and paraphernalia found in plain view after the officers' charge on the bathroom. The police attempt to justify their presence in the bathroom on two grounds:

[34]A planned, warrantless intrusion to seize items hoped to be found in plain view, fear of which motivates us to require the presence of exigent circumstances for the entry, has never been permitted. Coolidge, 403 U.S. at 469-71 nn.26-27, 91 S.Ct. 2022.

[35]The seizure of Chandler's ready-to-hand pistol was entirely reasonable; indeed, a failure to do so would have been ludicrous. This seizure is the paradigm of why a warrantless search incident to a legal arrest is acceptable. To rule the pistol inadmissible had we been asked to do so would require us to hold either that the arrest itself was invalid because the officers who made it on a proper warrant were where they should not have been when they executed it or to hold that though they had a "right" to seize the pistol pursuant to a valid arrest and in reason could have done nothing less, still the pistol must be suppressed as evidence because it was a fruit of the original improper entry. Neither holding seems to us one appropriate to the real world, and we would decline to make either.

that they had probable cause to believe that Troise, the third suspect named in their arrest warrants, was present in the house, and that they needed to conduct a safety search to prevent danger to the arresting officers. We need not consider their belief in Troise's presence,[36] because their bathroom entry can survive as a protective sweep to avoid threats from unknown persons. The Supreme Court in *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1965), declared that although an arresting officer can search the suspect's person for weapons and evidence that could be destroyed, as well as the immediate area where the arrestee could grab a weapon, the policeman cannot routinely search other rooms absent some exception to the search warrant requirement. This circuit has recognized such an exception in a housewide search after a proper arrest for the purpose of making a cursory safety check when "the circumstances [provide], at the least, probable cause to believe that a serious threat to safety [is] presented." *United States v. Smith*, 515 F.2d 1028, 1031 (5th Cir. 1975) (per curiam) ("a serious and demonstrable potentiality for danger").[37] The heinous nature of the crimes, the lateness of the hour, the arrests of Cravero and of Chandler in possession of a loaded pistol, and the suspicious noises coming from the bathroom more

[36]Even were we to agree with the government that the officers had probable cause to believe Troise present, this would not cure the illegal entry, although the subsequent seizure would still be permissible—based not on the plain-view doctrine, since without exigent circumstances the officers were still not properly in the bathroom, cf. note 38 infra, but on the ground that the items were in possession of a person the officers observed in the process of committing a crime. Compare text at note 39 infra.

[37]Accord, McGeehan v. Wainwright, 526 F.2d 397, 399-400 5th Cir. 1976) (per curiam) (surveying cases); United States v. Looney, 481 F.2d 31, 33 (5th Cir.), cert. denied, 414 U.S. 1070, 94 S.Ct. 581, 38 L.Ed.2d 476 (1973) (in addition to a threat to safety, the agents must be looking for dangerous people, not things).

than justified the agents' cursory search to secure the immediate area and to insure their own physical safety. Since the agents were properly inside the bathroom, their seizure of the cocaine and paraphernalia can be justified on two separate and independent grounds. First, the officers observed the items in "plain view" in a room that they had properly entered.[38] Second, they observed Willets in the process of committing the crime of possession of narcotics, which gave them grounds to arrest her and seize the items here in question since they were in an area within her control.[39] Thus, the items were properly admitted, despite the illegal entry.

(4) *The limits of our holding.*

Having said so much, we do not think it amiss to indicate something of what we do *not* hold.

[16] We do not countenance the original, warrantless entry of Cook's residence, nor would we suffer admission of the fruits of an unlimited, warrantless search of her residence: matter discovered, for example, in a room remote from the scene of the arrests or as a result of ran-

[38]Something found in the living room in plain view would not have been admissible because the officers' presence there was improper. Only the legal arrest of Cravero and Chandler, followed by scuffling sounds, created the "extraneous valid reason" that in turn validated the safety check of the bathroom.

[39]See Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); United States v. Jones, 475 F.2d 723, 727-28 (5th Cir. 1973). Since the security-search rationale permits us to approve the bathroom entry, we need not consider here the broader issue that the concurring opinions in United States v. Watson, ____ U.S. ____, 96 S.Ct. 820, 46 L.Ed.2d 598, 614 (1976) Stewart and Powell, JJ., concurring in separate opinions), assert was left open by the majority opinion: whether or when the police can lawfully make a warrantless arrest in a private place.

sacking bureau drawers, or the like. But being unable to find the arrests by warrant of Chandler and Cravero invalid, we are likewise unable to condemn as evidence items seized as a result of reasonable and appropriate actions taken by the police occasioned by and directly resulting from these valid arrests.

We do, in other words, no bold work here. Rather, we seek to lay course between the overhanging absurdity of the sporting theory of justice on the one side and the menace of police irruption into residences on the other.

VI. *Hearsay Declarations of the Previously Acquitted Co-Conspirator*

[17, 18] Appellants Chandler and Willets attack as hearsay a witness' damaging account of statements made by an alleged co-conspirator who had been acquitted in an earlier trial of this conspiracy. A witness can testify to declarations made to him by a co-conspirator only if the government by independent evidence establishes a prima facie case of the existence of a conspiracy and introduces at least "slight evidence" to connect with the conspiracy both the declarant and the defendant against whom the statement is introduced, which requires "a showing of a likelihood of an illicit association between the declarant and the defendant," *United States v. Lawson*, 523 F.2d 804, 806 (5th Cir. 1975); *Park v. Huff*, 506 F.2d 849, 859 (5th Cir.) (en banc), *cert. denied*, 423 U. S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975); *see United States v Oliva*, 497 F.2d 130, 132-33 (5th Cir. 1974). Appellants, who concede that the prosecution met its initial burden, argue that an alleged co-conspirator's *prior* acquittal deprives the trial judge of any right to find that the government has made the requisite showing of that person's participation in the

conspiracy. Other circuits have held, and we agree, that after the government has made the requisite showings, the admission of testimony under the co-conspirator exception to the hearsay rule is not rendered retroactively improper by *subsequent* acquittal of the alleged co-conspirator. *See United States v. Jacobs*, 475 F.2d 270, 284 n.28 (2d Cir.), *cert. denied*, 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed.2d 53 (1973); *Kamansuke-Yuge v. United States*, 127 F.2d 683, 689 (9th Cir.), *cert. denied*, 317 U.S. 648, 63 S.Ct. 43, 87 L.Ed. 522 (1942).

[19] We see no reason for a differing rule when acquittal occurs before the hearsay testimony is admitted. The earlier acquittal signifies that the government failed to prove the declarant a participant in the conspiracy beyond a reasonable doubt; this circumstance in no way forecloses the government, in a subsequent case, from establishing by slight or even preponderant evidence the declarants' participation. The independent "slight evidence" necessary to meet the threshold admissibility requirement means only that the evidence would be sufficient to support a finding by the jury that the declarant was a co-conspirator,[40] obviously not inconsistent with an earlier jury's inability to so determine beyond a reasonable doubt.[41] The problem is at bottom one of judicial estoppel. The declarant's earlier acquittal, to be sure, forecloses a redetermination of his guilt because of considerations of double jeopardy and may also properly be said to establish finally that he cannot be found beyond reasonable doubt to have been a conspira-

[40] Cf. United States v. Nixon, 418 U.S. 683, 701 & n.14, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[41] Appellants' additional argument that some of the acquitted co-conspirator's statements were themselves hearsay is inconsequential since all statements were originally uttered and repeated by participants of the conspiracy in furtherance of it.

tor. But it no more forecloses a determination, even by a preponderance of the evidence,[42] that he was one than a subsequent acquittal, and this is more than is required for admission of his declaration.

VII. Prosecutor's Cross-Examination of Defense Witness

[20, 21] Appellant Siegal objects that the prosecution improperly attacked Siegal's character by eliciting from a defense witness that he had once represented Siegal. But neither the question nor the witness' response—that he had represented Siegal "[o]ne time that stands out in my mind" and also possibly in traffic court—in any way suggests representation in a criminal manner or prior criminal activity. Furthermore, the questions were obviously aimed at revealing possible bias because of a prior business relationship. "Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility." C. McCormick, Handbook of the Law of Evidence §40, at 78 (2d ed. E. Cleary 1972); see Aetna Insurance Co. v. Paddock, 301 F.2d 807, 812 (5th Cir. 1962), quoted in Ellis v. Capps, 500 F.2d 225, 227 Cir. 1974).

VIII. New Trial

[22] Appellant Cook requests a new trial[43] based on testimony given in an unrelated case seven months after her trial by one Andries, a government informer-witness who there asserted that federal agents wanted him to give false testimony by saying that Cook knew that the cocaine was being brought to her house the night of the arrests when in

[42]See generally 50 C.J.S. Judgments §752, at 272-73 (1947).

[43]We consolidated with the main cause Cook's appeal from the lower court's denial of her motion for a new trial.

fact she neither knew nor consented. As we noted in United States a. Jacquillon, 469 F.2d 380 (5th Cir. 1972), cert. denied, 410 U.S. 938, 93 S.Ct. 1400, 35 L.Ed.2d 604 (1973), in order to justify a new trial on the ground of newly discovered evidence.

> the rule is that the evidence must in fact be newly discovered and that the movant must have exercised due diligence in discovering the evidence. It must not be merely cumulative or impeaching. Furthermore, the new evidence must be material and be such that it would probably produce an acquittal in a new trial.

Id. at 388. Cook fails to meet these requirements because this "evidence" is not newly discovered. Appellant's counsel admits in his brief that eight months previously he had spoken by telephone to Andries, who at the time was in the protective custody of the United States Marshall,[44] and obtained the same information. He insists that this evidence is nonetheless newly discovered because only after he received a copy of Andries' sworn testimony in the later trial for use as possible impeachment evidence did he have the opportunity to insure that Andries, if called as a defense witness, would testify to the same story he had previously related by telephone.[45] But we cannot agree that lack of assurance that a potential witness will testify as planned

[44]The prosecution at one point apparently intended to call Andries as a witness in Cook's trial but did not do so.

[45]Although Cook's counsel had taped the telephone conversation, he claimed that he could not use transcripts of the taping to impeach Andries for fear of being prosecuted under a Florida statute, Fla.Stat. Ann. §934.03 (1973), that appears to prohibit one not a law-enforcement official from taping a telephone conversation without the consent of all parties to the conversation. Andries testified, however, that he had consented to the taping.

makes the expected testimony newly discovered evidence once that assurance is received. The requirements for a nw trial based on newly discovered evidence are clear, and Cook has failed to meet them.

[23] Cook also demands a new trial based on a claimed violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by the prosecution's failure to reveal prior to Cook's trial a statement by Andries to the prosecutor that the information Andries had previously furnished the government about Cook was false. But appellant's attorney conceded that he had obtained the same information prior to trial, so the prosecutor can hardly be charged with suppressing it. In the context of the Brady requirement, "any allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense." Giles v. Maryland, 386 U.S. 66, 96, 87 S.Ct. 793, 808, 17 L.Ed.2d 737 (1967) (White, J., concurring). The purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him. Irrespective of whether the statement here was exculpatory evidence under *Brady*, a question we do not reach, there is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production.[46]

[46]Accord, Maglaya v. Buchkoe, 515 F.2d 265, 268 (6th Cir.), cert. denied, 423 U.S. 931, 96 S.Ct. 282, 46 L.Ed.2d 260 (1975); United States v. Ruggiero, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2718

D. C. Docket No. FL-74-91-CR-PF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD DOUGLAS CRAVERA, a/k/a "Ricky", SHARON WILLETS, MARIANNE COOK, PHILLIP SIEGAL, RONALD CLIFFORD CHANDLER, and BOBBY EUGENE MILLER,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

Before BROWN, Chief Judge, TUTTLE and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 6, 1976

Issued as Mandate:

[TITLE OMITTED]

Jan. 7, 1977.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(Opinion August 6, 1976, 5 Cir., 1976, __ F.2d __).

Before BROWN, Chief Judge, and TUTTLE and GEE, Circuit Judges.

GEE, Circuit Judge:

In their petitions for rehearing, appellants Cook, Cravero, Chandler and Willets have questioned the logic of our panel's holding that the arrests made after an illegal entry of Ms. Cook's home were somehow made legal because of valid arrest warrants. Upon reconsideration of this seeming paradox, we find that we erred in requiring probable cause plus exigent circumstances to validate the entry without a search warrant.

As early as Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925), the Supreme Court recognized that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to intrude into a home. See also United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1957); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). In Ker v. California, the Court quoted with approval Justice Traynor's opinion in People v. Maddox, 46 Cal.2d 301, 306, 294 P.2d 6, cert. denied, 352 U.S. 858, 77 S.Ct. 81, 1 L.Ed.2d 65 (1956):

> "[W]hen an officer has reasonable cause to enter a dwelling to make an arrest and as incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable."

374 U.S. 23, 39, 83 S.Ct. 1623, 1633, 10 L.Ed.2d 726 (1963).

[1, 2] The law of this circuit, which our panel opinion overlooked, is that when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect. United States v. James, 528 F.2d 999, 1017 (5th Cir. 1976); Rodriguez v. Jones, 473 F.2d 599, 605-06 (5th Cir.), cert. denied, 412 U.S. 953, 93 S.Ct. 3023, 37 L.Ed.2d 1007 (1973). The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant. When one says "probable cause," therefore, one also says either "magistrate" or "exigent circumstances." Reasonable belief embodies the same standards of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to

the magistrate and without exigent circumstances.[1] Accord United States v. Brown, 151 U.S.App.D.C. 365, 467 F.2d 419 (1972); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967). The reasonableness of the officer's judgment is always subject to judicial review, of course.

[3] Because entry to execute an arrest warrant is treated by this court as an exception to the requirement of a search warrant,[2] we withdraw that portion of our panel opinion which held the entry into Ms. Cook's home illegal. Having personally observed Cravero and Chandler enter the Cook residence, the officers' belief that the suspects were within those premises was clearly reasonable, and their entry to execute arrest warrants on those two individuals was therefore legal and the arrests valid. The protective sweep incident to the arrests was permissible for the reasons noted in our earlier opinion.

The petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the petition for rehearing en banc is DENIED.

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[1] One explanation for not requiring a search warrant to enter a third person's home to execute an arrest is that there is no need to particularize the search—the arrest warrant has already done that. There is not the same danger of the "general writ" which is the reason for requiring that a search warrant describe what specific items police are allowed to search for.

[2] The exception is limited to protect against a general police canvassing of the homes of all of the suspect's acquaintances. There must be a reasonable belief that the person named in the arrest warrant is inside; furthermore, the entry is valid only for the purpose of executing the arrest and not for conducting a general search.

Supreme Court, U. S.
FILED
APR 19
MICHAEL RODAK, JR., CLERK

No. 76-1090

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARIANNE COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26), as modified by its opinion denying rehearing (Pet. App. 29-31), is reported at 545 F. 2d 406.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27-28) was entered on August 6, 1976. A petition for rehearing was denied on January 7, 1977 (Pet. App. 31). The petition for a writ of certiorari was filed on February 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant authorizes law enforcement officers to enter the house of a third party, to make

the arrest, where they are certain that the person named in the warrant is in the house.

2. Whether officers, once properly in a house, may quickly examine their surroundings to guard against the possibility that persons elsewhere in the house might endanger their safety.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with intent to distribute that drug, in violation of 21 U.S.C. 841(a)(1).[1] She was sentenced to four years' imprisonment, to be followed by three years' special parole.

1. In late June 1974 a narcotics organization headed by Richard Cravero imported a large quantity of cocaine and marijuana into the United States by boat. To facilitate this operation, Cravero hired William Orr, an informant, to pilot one of the boats. After the drugs had been imported into this country, Cravero was unable to pay for Orr's services. Orr and Cravero arranged to meet in the early evening hours of July 14, 1974, at a restaurant, to discuss this problem.

Federal agents outside the restaurant observed Orr meet with Cravero, Ronald Chandler and Sharon Willets (S. Tr.

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[1]Petitioner also was charged, together with Richard Cravero, Ronald Chandler, Sharon Willets, Bobby Miller, Phillip Siegal, and others with conspiring to import and possess narcotics. She was found not guilty of the conspiracy. Cravero, Chandler, Willets, Miller and Siegal were convicted. Miller's petition for a writ of certiorari (No. 76-5582) was denied on February 22, 1977. Cravero, Chandler, and Willets also have filed a petition (No. 76-1267); that petition does not present any issue in common with those involved here.

65-66, 213-214, 402-403, 446-447).[2] The agents possessed warrants to arrest both Cravero and Chandler for narcotics crimes that the court of appeals described as of a "heinous nature" (Pet. App. 20). The officers also had information that the two men were heavily armed and had been involved in a murder (S. Tr. 164-165). Their appearance at the restaurant was the first time the agents had been able to locate them since the issuance of the warrants (S. Tr. 204, 466-470, 548, 584, 766-768).

The agents did not attempt to arrest Cravero and Chandler at the restaurant. They wished to avoid compromising Orr's role as an informant and to protect Orr and his family from possible reprisal (S. Tr. 113-114, 616-617, 628-629). The agents watched as Cravero, Chandler, and Willets left the restaurant, got into a car driven by Donald Troise (another person named in an outstanding arrest warrant) (S. Tr. 994)), and drove off (S. Tr. 86-88, 221-226, 404-406, 452-453, 480, 486-487, 498, 599, 909-913, 916-917, 921-922, 931, 933, 942).[3]

The agents followed the car to a Miami motel, where the occupants lingered for several minutes before driving away again, having dropped off one of the original passengers (S. Tr. 86-88, 100-101, 227).[4] The car went to petitioner's house, and its passengers went inside (S. Tr. 105, 487, 494-495, 499,

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[2]"S. Tr." refers to the transcript at the pretrial suppression hearing.

[3]The agents could not identify a fifth person they saw in the car (S. Tr. 486-487, 733).

[4]The car then contained Cravero, Chandler, Willets and an unidentified fourth person. The agents were unable to tell whether any occupant of the car had remained at the motel (S. Tr. 407). Some of the agents conducted an investigation to determine if Troise had remained, but they did not find him there (S. Tr. 914-915); they notified the other agents of this (S. Tr. 940-941).

502-504, 643-644). Shortly after 9:00 p.m. numerous agents surrounded the house.[5]

About four hours later the agents, having concluded that Chandler and Cravero would not soon leave petitioner's house, decided to enter the house and execute the arrest warrants (S. Tr. 120-121). Before the agents decided to make the arrest, they had learned that Cravero had telephoned Orr and indicated that he was aware of Orr's role as an informant (see Pet. App. 12 n. 18).

While other agents surrounded the house, two agents knocked on the door, identified themselves, and announced that they had arrest warrants for persons inside (S. Tr. 126, 410-411, 514-515, 650). After approximately one minute, petitioner opened the door and exclaimed: "Hey, you guys, the cops are here" (S. Tr. 412, 515, 650-653). The agents promptly entered; they found Cravero in the living room and arrested him (S. Tr. 413-414, 418, 516-517, 653). They immediately saw Chandler standing in the doorway of the master bedroom, next to a television set on which there was a pistol (S. Tr. 131, 138, 415-416, 427-430, 522-527, 653-656, 719). They arrested Chandler and seized the gun.

The officer who seized the pistol heard "rustling noises" or the sound of someone "scuffling around" in the adjacent bathroom (S. Tr. 431, 528, 658). Expecting to find Troise, who had a reputation for violence and who was reported to be heavily armed (S. Tr. 164-165, 722, 913, 933), three officers entered the bathroom with weapons drawn (S. Tr. 427, 431, 533, 666, 719-722). They found not Troise but Willets, leaning over the shower stall (S. Tr. 421-426, 534,

[5]The agents saw Phillip Siegal, but no one else, leave petitioner's house (S. Tr. 511-513, 586-587). Siegal drove off in the same car that had been used by the group when they left the restaurant earlier in the evening.

671-672). When Willets stood up, an agent saw a metal tray containing a large quantity of white powder (later determined to be cocaine) on the floor of the shower (S. Tr. 677, 687-688, 720, 724), and he also noticed, on the counter next to the sink, paraphernalia used in the processing of narcotics (S. Tr. 717-718). The officers then looked in the closed portion of the shower stall and in a full-length closet, both places where a man could hide, but did not find Troise or anyone else (S. Tr. 537, 541, 572).

The cocaine and the processing paraphernalia were introduced into evidence at petitioner's trial.

2. The court of appeals initially held that the arrest warrants did not authorize an entry into petitioner's house (Pet. App. 14-18). The court concluded that an entry into a third person's dwelling to make an arrest required a search warrant, based on probable cause to believe that the person to be arrested was within. It explained that an entry into a third party's home without a search warrant "[would] be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains" (Pet. App. 16-17; footnote omitted).

The court held that no exigent circumstances supported the entry into petitioner's house (Pet. App. 13-14 and n. 24). It upheld the introduction of the evidence, however, reasoning that it had been seized as a fruit of the arrests rather than as a fruit of the illegal entry (Pet. App. 18-26). The agents were entitled to arrest Cravero and Chandler, it explained, and the contraband was inadvertently discovered in plain view during a protective sweep of the house for other dangerous persons.

On petition for rehearing, the court of appeals receded from its original analysis and held that "an entry to execute an arrest warrant is an exception to the requirement of a

search warrant to intrude into a home" (Pet. App. 29). The court wrote that the arrest warrant serves the same role as a search warrant by particularizing the search (*id.* at 31 n. 1) and that officers with an arrest warrant may properly enter a residence, even that of a third party, if they have probable cause to believe the suspect will be found inside (*id.* at 30-31). It therefore denied the petition for rehearing.

DISCUSSION

1. There are two important unresolved issues concerning the propriety, under the Fourth Amendment, of entries to make arrests on probable cause. The first is whether a warrant, of any type, is necessary to enter a suspect's own dwelling[6] to arrest him on probable cause to believe that he has committed a felony. The second is whether a search warrant is necessary to enter the dwelling of a third person to arrest a person who is lawfully subject to arrest and who there is probable cause to believe can be found there. See *United States* v. *Santana*, 427 U.S. 38, 43-44 (White, J., concurring), 45 (Marshall, J., dissenting); *United States* v. *Watson*, 423 U.S. 411, 432-433 and n. 7 (Powell, J., concurring), 433 (Stewart, J., concurring). This case presents the second of these questions.

We have argued that neither an arrest warrant nor a search warrant is necessary to enter the dwelling of a suspect to arrest him on probable cause to believe that he has committed a felony.[7] If that argument is correct, or

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[6]We use "dwelling" to mean a private place in which the person resides. It would include a hotel or motel room rented by a transient.

[7]See pages 30-46 of our brief in *United States* v. *Santana*, No. 75-19, October Term, 1975.

if an arrest warrant alone is sufficient, then the evidence seized in petitioner's house could be used at trial against Cravero and Chandler, for they surely could have no greater expectation of privacy or right to be free of arrest in petitioner's house than they would have had in their own. The arrest warrants issued for Cravero and Chandler, moreover, amounted to judicial authorization to deprive them of their liberty, and they would not be entitled to complain that this deprivation was effected in one place rather than another; they had no legitimate expectation of privacy in their surroundings, because they had no legitimate entitlement to remain at liberty. Furthermore, because persons are highly mobile, an arrest warrant need not state the place at which the arrest is to take place—the suspects might move from one place to another even as the warrants are being obtained.

For these and other reasons, it is appropriate to conclude that a person arrested pursuant to an arrest warrant in the dwelling of a third party cannot complain about the seizure of evidence during the entry and arrest. It does not follow from this, however, that the evidence also may be introduced against the third party. Petitioner had a legitimate expectation of privacy in her dwelling; that expectation was not diminished in this case by probable cause to arrest her, and there was no prior judicial determination that it was proper to search petitioner's house for Cravero and Chandler.

The courts of appeals are in conflict on the question whether an arrest warrant is sufficient to authorize officers to enter the dwellings of third parties to look for the suspect named in the warrant. Some courts of appeals—emphasizing historical practices, the transience of persons who are not at home, the fact that the arrest warrant already has particularized the search, and the fact that a search for

persons is not as intrusive as a search for chattels—have held that evidence found in an entry pursuant to an arrest warrant may be introduced against the third party whose home has been entered.[8] The Third Circuit has disagreed, and it has required either a search warrant or exigent circumstances as a precondition to the entry of a dwelling of a third party.[9] Still other courts do not appear to distinguish between entries into the suspect's dwelling and entries into a third party's dwelling; many of these courts appear to require a search warrant for any arrest entry.[10]

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[8]In addition to the instant case, see *United States* v. *McKinney*, 379 F. 2d 259, 262-263 (C.A. 6) (issuance of an arrest warrant is an "exceptional circumstance" authorizing search, in light of the mobility of the suspect), and *United States* v. *James*, 528 F. 2d 999, 1017 (C.A. 5). See also *United States* v. *Brown*, 467 F. 2d 419 (C.A.D.C.) (announcing a general rule that an arrest warrant authorizes entry anywhere that the officers have probable cause to believe that the suspect may be found, and upholding introduction of evidence against the person named in the warrant). An arrest warrant authorizes the apprehension of the suspect "at any place within the jurisdiction of the United States" (Fed. R. Crim. P. 4(d)(2)), and these courts hold that this authorization is constitutionally adequate.

[9]*Government of the Virgin Islands* v. *Gereau*, 502 F. 2d 914, 928-930 (C.A. 3), certiorari denied, 420 U.S. 909 (admitting evidence in light of exigent circumstances); *Fisher* v. *Volz*, 496 F. 2d 333, 338-342 (C.A. 3) (*dictum*).

Petitioner contends (Pet. 19-20) that *Rice* v. *Wolff*, 513 F. 2d 1280, 1292 (C.A. 8), reversed on other grounds *sub nom. Stone* v. *Powell*, No. 74-1222, decided July 6, 1976, also requires a search warrant or exigent circumstances as a condition to an arrest entry. This is incorrect. *Rice* held only that officers executing an arrest warrant on the premises of a third party must at least have probable cause to believe that the suspect is there; the court explicitly reserved the question whether a search warrant is necessary. See also *Lankford* v. *Gelston*, 364 F. 2d 197, 202-203 and n. 6 (C.A. 4) (*en banc*) (reserving question).

[10]See *Vance* v. *North Carolina*, 432 F. 2d 984 (C.A. 4); *United States* v. *Shye*, 492 F. 2d 886 (C.A. 6); *Salvador* v. *United States*, 505 F. 2d 1348 (C.A. 8). All of these courts rely upon *Dorman* v. *United States*, 435 F.

The question whether officers should obtain a search warrant, in addition to an arrest warrant, before entering a place other than the residence of the suspect is important to the administration of the criminal justice system. Officers should know what is expected of them in this regard, so that evidence of crime is not needlessly suppressed. The question has never received the attention of this Court. We therefore believe that the Court should grant review here. The court of appeals held that the entry of petitioner's house was not required by exigent circumstances (Pet. App. 13-14 and n. 24)[11] and was not a pretextual entry to gain an opportunity

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2d 385 (C.A. D.C.) (*en banc*), for the proposition that a warrant or exigent circumstances ordinarily are required to enter a private place to make an arrest. Neither *Dorman* nor the cases following it distinguish between arrest and search warrants or between entries into the suspect's house and the house of a third party. But each of the courts following *Dorman*, including the District of Columbia Circuit, has made such a distinction in another case. See notes 8 and 9, *supra*. See also *United States* v. *Johnson*, C.A. D.C., No. 73-2221, decided January 12, 1977 (*en banc*), petition for a writ of certiorari pending, No. 76-6366 (officers may enter without a warrant to arrest persons seen inside, in plain view, committing a crime).

On the other hand, at least two courts of appeals have indicated that probable cause alone ordinarily is sufficient to support an arrest entry. See *United States* v. *Fernandez*, 480 F. 2d 726, 740 n. 20 (C.A. 2); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (C.A. 7). The American Law Institute also does not distinguish between arrests on the suspect's premises and arrests in some other place. Its proposed rule would allow arrests in any place, on probable cause, without a warrant. The Institute would, however, require an arrest warrant or exigent circumstances for a nighttime arrest. ALI, *A Model Code of Pre-Arraignment Procedure* §120.6 and pp. 306-314 (1975).

[11]The prosecution argued in the court of appeals that the entry was justified by exigent circumstances. This argument was supported by the holdings of a number of courts, following *Dorman* v. *United States*, *supra*, that create a balancing test considering a large number of factors that might justify a warrantless arrest entry. Some of these factors, including the seriousness of the crime, the fact that the suspects were armed, and so on, indicated the appropriateness of a prompt arrest in this case. The courts of appeals have held that a combination of a

to search the house (*id.* at 11-12 and nn. 17-19). This case therefore presents the question clearly, and we see no reason for the Court to postpone addressing it.

2. If the agents were properly in petitioner's house to arrest Cravero and Chandler, then they were entitled to glance into the bathroom to ensure their personal safety; the contraband found in plain view in those circumstances could lawfully be seized.[12] The agents' brief inspection was justified by ordinary principles of exigent circumstances. The agents had converged near the bathroom to arrest Chandler, seized a gun, and heard noises in the bathroom that might well have been caused by another armed person. Their decision to open the bathroom door was justified not only by what they had seen and heard but also because they suspected that Troise, whom they had a warrant to arrest and who was known to be armed and dangerous, was in the house. The officers saw Troise earlier in the car and had not since located him; they were entitled to take reasonable steps both to find him in order to arrest him and to protect themselves from him. See *Adams* v. *Williams*, 407 U.S. 143, 146; *Warden* v. *Hayden*, 387 U.S. 294, 299. The agents also knew that persons in addition to Cravero and Chandler were in the house—if not Troise, then Willets or others—and these persons constituted a possible danger against which the officers were entitled to protect themselves.

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number of these factors amounts to "exigent circumstances" justifying prompt entry. We do not make an exigent circumstances argument here, however, because one factor strongly indicates the absence of a need for haste: the agents had surrounded petitioner's house, waited patiently for more than four hours, and decided to enter only when it became clear that nothing significant was happening and that Cravero and Chandler were not likely to emerge. This consideration seems to be the antithesis of exigency.

[12] *Harris* v. *United States*, 390 U.S. 234, 236.

The court of appeals held that the inspection of the bathroom was justified as a "prospective sweep" by officers entitled to be within the house (Pet. App. 19-21). Petitioner contends (Pet. 16-19) that this justification is insufficient. But whether or not the officers would have been justified in conducting a "protective sweep" in the absence of reason to believe that there were persons inside the bathroom, they were entitled to proceed as they did here in light of their reasonable suspicion that someone was in the bathroom and might pose a danger to them. The Court therefore need not consider in this case whether, in general, law enforcement officers may quickly glance into other rooms of a house in which they have made an arrest in the absence of specific and articulable reasons to believe that they may be in danger.[13]

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[13] There is conflict among the circuits on this question. Compare *United States* v. *Smith*, 515 F. 2d 1028 (C.A. 5), certiorari denied, 424 U.S. 917, and *United States* v. *Blake*, 484 F. 2d 50 (C.A. 8), certiorari denied, 417 U.S. 949, which hold that such inspections are permitted, with *United States* v. *Cooks*, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996, and *United States* v. *Rodriguez*, 532 F. 2d 834 (C.A. 2) (by implication), which conclude that they are not. Some courts of appeals are internally divided on the question. Compare *United States* v. *Carter*, 522 F. 2d 666 (C.A. D.C.) (protective sweeps are impermissible), with *United States* v. *Miller*, 449 F. 2d 974, 977 (C.A. D.C.) (protective sweeps are a reasonable precaution); compare *United States* v. *Basurto*, 497 F. 2d 781, 787-790 (C.A. 9) (impermissible), with *United States* v. *Hobson*, 519 F. 2d 765, 776 (C.A. 9), certiorari denied, 423 U.S. 931 (permissible). We believe that the propriety of protective sweeps is an important question that should be addressed in an appropriate case. The present case, however, does not squarely present the question that has divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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